**Before the**

**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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In the Matter of

ET Docket No. 97-206

Technical Requirements to Enable Blocking of
Video Programming Based on Program Ratings

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## COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION

Introduction

The American Civil Liberties Union (ACLU) is a nonpartisan organization of more than 250,000 members nationwide dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. For nearly a century, the ACLU has sought to preserve and strengthen the First Amendment as a bulwark against all forms of governmental censorship.

The ACLU has previously submitted extensive comments to the Federal Communications Commission (FCC) in opposition to government-prescribed ratings systems for television programming that single out sex, violence, or other controversial subjects on television because we believe they infringe the fundamental principles of free expression.[1] We adhere to our prior views. We respectfully submit these comments on the different issues raised by the FCC's proposal for emerging technology and urge the Commission to refrain from entering into the censorship business.

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[1] See, In the Matter of Industry Proposal for Rating Video Programming, CS Docket No. 97-55, Reply Comments of the American Civil Liberties Union, May 8, 1997.

In particular, the ACLU urges the Commission not to expand the application of the proposed rules to include any and all equipment *capable* of displaying or receiving video programming, including personal computers and Digital Television (DTV), Multi-point Distribution Systems, Direct Broadcasting Systems (DBS) and other emerging technologies. The ACLU believes that Congress has not directed the FCC to mandate the inclusion of the V-Chip in these emerging technologies. Furthermore, such an expansive reading of the Telecommunications Act would run afoul of the First Amendment protections accorded to speech on interactive media, such as the Internet, as a result of the landmark Supreme Court decision Reno v. ACLU. 521 U.S. -- , 65 LW 4715 (1997). Finally, we urge the FCC to abstain from prohibiting distribution services from deleting or modifying ratings information from television programming as a violation of the First Amendment.

## I. THE FCC IS NOT REQUIRED TO MANDATE INCLUSION OF BLOCKING TECHNOLOGY IN PERSONAL COMPUTERS CAPABLE OF RECEIVING VIDEO PROGRAMMING UNDER THE 1996 TELECOMMUNICATIONS ACT.

Section 551(c) of the Telecommunications Act of 1996 ("the Act"), the Parental Choice in Television Programming, directs the FCC to "require in the case of an apparatus designed to receive television signals ... that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating...". Section 551 (e)(2) requires the Commission to consult with the television manufacturing industry to find an effective date for inclusion of the V-chip in televisions. In contrast, with regard to technologies like the Internet, Congress directed the FCC in section 552(d)(4)(A) of the Act to determine the availability of alternative blocking technology that enables parents to block programming based on identifying programs without ratings.

Although the language of the Act addresses the need for traditional television manufacturers to comply with the provision at issue, the Commission's current Notice of Proposed Rulemaking (NPRM) calls for expansion of the Telecommunications Act of 1996, to mandate inclusion of blocking devices in ***all*** technology capable of displaying broadcast video programming, even in apparatus that is not primarily designed for television viewing. Specifically, the NPRM includes a requirement for personal computer manufacturers to include V-chip technology. Paragraph 22 of the NPRM, states in pertinent part:

> "In addition, personal computer systems, which are not traditionally thought of as television receivers, are already being sold with the capability to view television and *other video programming.* Section 551(c) of the Telecommunications Act makes it clear that the program blocking requirements were intended to apply to any "apparatus designed to receive signals" that has a picture screen of 13 inches or larger. Accordingly, we believe that the program blocking requirements we are proposing should apply to any television receiver meeting the screen size requirements, regardless of whether it is designed to receive video programming that is distributed only through cable television systems, MDS, DBS, *or by some other distribution system.* These requirements would also apply to any computer that is sold with TV receiver capability and a monitor that has a viewable picture size of 13 inches or larger, as we currently do of closed captioning." (emphasis added)

The NPRM broadly states that the rules should apply to any computer "regardless of whether it is designed to receive video programming that is distributed only through cable television systems, [satellite], or by some other distribution system." Under the broadest interpretation the rules could be extended to cover any video programming viewed using a computer.[2] Despite this confusion, the FCC has not

[2] See, Brook Meeks, Is there a v-chip in your PC's future? MSNBC (undated); FCC Suggests V-Chips for PCs Cybertimes, October 30, 1997; FCC plans PC V-Chip C|NET October 29, 1997; FCC Wants V-Chips In PCs TECHWIRE October 29, 1997; Declan McCullagh, The P.C. P.C. Netly News; Web TV: A Marriage Full of Promise Source: Telecom A.M.---Nov.10, 1997; Changing Channels: Will the Internet Become TV, PC Magazine (November 1997); Spec to bring TV-like content to Net C|NET November 6, 1997.

publicly offered clarification as to what types of personal computer technology would fall under the purview of the proposed rules.[3]

In addition, the NPRM statement that Section 551 (c) of the Act "makes it clear that program blocking requirements were intended to apply to any apparatus" capable of receiving television signals, is plainly contrary to the expressed view of Congress[4] and a conclusion with which the ACLU strongly disagrees. Congress instead suggested in Section 551 (d) (4) et seq., that as new video technology is developed, the Commission determine the availability of less restrictive and more informative alternatives. Thus, Congress did not propose the mandatory inclusion of V-chip technology, but directed the Commission to determine whether other features could be used to provide greater user choice over content.

We believe that the rush to embrace the V-chip for traditional televisions has been more damaging to the development of other user friendly tools that do not require the state imposition of a rating and blocking system. Previously submitted comments by the television manufacturing industry also make clear that the FCCs haste in establishing schedules for the inclusion of the V-chip in televisions may result in poorly adapted equipment that may quickly become obsolete.[5]

The expansion of V-chip technology into the computer realm makes even less sense. Interactive media is subject to even more rapid change than television and that change increasingly allows for more user choice and control.

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[3] The NPRM refers to the FCC Closed Captioning Requirements for Computer Systems which do not apply to computers sold without monitors, or for "plug-in" circuit boards that add television reception capability. This offers little guidance or illumination on the Commission's intended application of the rules at issue.

[4] The FCCs failure to investigate alternatives is particularly troubling since alternatives, such as transmitting program reviews, do exist.

[5] See, In the Matter of Revised Industry Proposal for Rating Video Programming, (CS Docket No. 97-55), Reply Comments of the Consumer Electronics Manufacturers Association, (CEMA).

## II. THE FCC MAY NOT REQUIRE COMPUTERS TO INCLUDE CENSORING TECHNOLOGY IF THEY ARE CAPABLE OF RECEIVING VIDEO PROGRAMMING VIA THE INTERNET OR BY OTHER MEANS:

Currently, there are at least three ways to view video programming on personal computers. The first model is where video programming can be viewed on "PC-TVs," computers that include built-in television receivers or have an added plug-in circuit board to provided video reception capability. Second, a personal computer user has her Web browser connected to an Internet Service Provider (ISP) with the appropriate enabling technology to permit a multimedia connection to the Internet. With this connection, a user who is on the Web can go to any number of sites to download or view video/audio objects. Until now, the slow speed of Internet dial-up connections has meant that it could take several minutes to view online video clips. However, with new high speed connections, large video files may be downloaded or viewable in a matter or seconds -- making it possible to view video programming online in real time, like television and radio. Webcasting offers access to a much greater number of speakers or content providers than traditional broadcasting.

PC-TVs and webcasting have only recently become available, with new models and features being marketed forth daily. Both offer a much greater spectrum of data, including programming information, than is possible by traditional broadcasting and under the current ratings scheme. The potential to offer greater information means does not mean the FCC should expand the reach of its content restriction through the V-chip. Instead, these technologies could offer transmission of program reviews or other detailed information about individual programs.

The Commission may not mandate blocking technology for computers with Internet software that provides the ability to view real-time video programs online. Unlike television, the Internet provides inexpensive, user controlled access and not government regulated or licensed access. Video programming displayed online may include traditional broadcast programming, but also includes a variety of authors and

producers that have never before had the ability to gain wide distribution. Such an application of the proposed rules not only runs counter to the Telecommunications Act, but represents an assumption of authority by the government over content on the Internet that has already been rejected by the Supreme Court.

In the landmark case Reno v. ACLU,[6] the Supreme Court overturned provisions of the Federal Communication Decency Act (CDA) and declared that the Internet is entitled to the highest level of free speech protection. The Court explicitly analogized the Internet to the traditional print media, saying that unlike broadcast media, which has been traditionally considered a more intrusive means of speech that is available to a fewer number of speakers, the virtually unlimited access and potential for speech means that the government requires a compelling reason to restrict lawfully protected speech.

As the lead attorneys and plaintiffs in the case, the ACLU successfully argued that the provisions of the CDA that would have made it a crime to communicate anything "indecent" online violated the First Amendment. The Court rejected the CDA because it was an overbroad means of addressing the government's asserted interest in protecting minors from inappropriate material -- the very same reason offered today by the Commission and Congress in enacting V-Chip regulations.

Moreover, the Court explicitly rejected the notion that the government has the authority to regulate constitutionally protected speech online. The Court stated, "the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." Reno v. ACLU, 521 U.S. -- , 65 LW 4727.

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[6] 521 U.S. --, 138 L.Ed.2d 874 (1997).

Although the ACLU believes that the same First Amendment values apply to each media, the Court has repeatedly stated that any government regulation of broadcast television is justifiable only because of the intrusiveness of television coupled with the scarcity of the broadcasting transmission spectrum. As the high court stated in Reno v. ACLU, neither of those rationale applies to the Internet.

Any FCC efforts to restrict content online, directly or indirectly, through a forced rating scheme would violate the First Amendment. It would also have the effect of turning what the Supreme Court call the most participatory medium into a bland and homogenized medium that provides access to only self-rated or censored speech.

## IV. THE FCC MAY NOT PROHIBIT OPERATORS THAT DISTRIBUTE VIDEO PROGRAMMING FROM DELETING OR MODIFYING PROGRAM RATINGS CARRIED ON LINE 21 OF VBI:

The NPRM states that the FCC proposes to amend its rules to ensure that ratings information is not deleted or modified before transmission by distributors. Put plain, this means that the FCC is selecting which of the "speakers" -- from the programs writers, to its producers, network and local stations has the power to set a rating and requiring all the other speakers to agree with the given rating. But by removing the power for any of these parties to modify ratings, the government also removes any flexibility from its proposed scheme -- it is deciding that national broadcasters make that decision, for all of their writers, producers, directors, affiliates and stations. There is no room for disagreement and there is no choice but for distributors to agree with the designation. Ratings must, by definition be national. Leaving one that might appropriate in Mississippi but that is not in New York.

Furthermore, there are serious First Amendment problems with compelling all program distributors from carrying ratings that they find objectionable or that they disagree with are critical. Government required ratings are a form of "forced speech" and

diminish any discretion of programming distributors in determining the relevance or appropriateness of the proposed program rating. That is, mandating labels compels private individuals and companies to say things about their creative offerings that they have no wish to say and with which they may disagree. The Supreme Court has made clear that such compelled speech is as much a violation of First Amendment rights as enforced silence. See, e.g., Riley v. National Federation of the Blind, 487 U.S. 781, 797 (1988); Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705, 714 (1977).

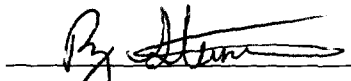
Ratings prescribed by the FCC pursuant to the Act can hardly be defended as an innocuous effort to empower parents by supplying them with neutral information. A truly non-coercive effort to inform parents, rather than censor what the government believes to be "negative" or dangerous ideas, would not rely on the minimal, inevitably misleading information conveyed by a letter or code that can be read by a computer chip. Parents are better served by fuller information (descriptions or reviews) that explains the context in which violent or sexual material is presented, and that enables them to make viewing decisions based on their own values and childrearing philosophies, and the personal maturity levels of their children.

Conclusion

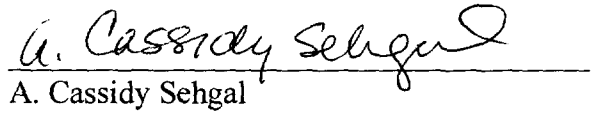
The ACLU believes that the extension of the V-chip rules is unnecessary and unwise under the Telecommunications Act of 1996. The ACLU believes that the FCC should not hastily embrace or extend plans to incorporate V-chip technology in emerging technologies. The FCC can and must exercise its discretion and consider alternatives such as media literacy, promotion of educational programming and episode reviews. We believe that there are alternatives that would not offend core First Amendment values and accomplish the same purpose. In the final analysis, violence and sex are dramatic, consistent themes in human life and history, and like other controversial subjects, need to be confronted and discussed rather than suppressed, whether through direct censorship

laws or through more indirect, convoluted governmental ratings and information blocking systems.

Respectfully submitted,



Barry Steinhardt
ACLU Associate Director



A. Cassidy Sehgal
William J. Brennan Fellow of the ACLU